Supreme Court, U. S.
FILED
APR 27 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1977.

No. 77-1205.

COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

v.

THEODORE MOODY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

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ARGUMENT.

I. The Issue Tendered by the Petition Is Not Raised in the Record.

The petitioner states its first issue as follows:

> Is the Pennsylvania death penalty statute which substantially restricts the imposition of that penalty and which only marginally restricts the mitigating evidence that may be considered at sentencing, violative of the Eighth and Fourteenth Amendments?

This defendant was sentenced under a statute providing for mandatory imposition of death in nine (9) categories of first degree murder unless the defendant proves by a preponderance of the evidence one of three mitigating circumstances: (1) consent by the victim, (2) duress, as defined, upon the defendant, and (3) "The age, lack of maturity, or youth of the defendant at the time of the killing". It is only the meaning of the third mitigating circumstance that was considered by the Supreme Court of Pennsylvania and that Court held that, as it defined the Pennsylvania law, the statute precluded consideration of other relevant information about the defendant whose fate was to be decided. On this narrow basis the Court held the statute did not pass constitutional muster under *Gregg, et al.*

Petitioner represents (Petition, p. 13) that the case presents an entirely different issue from the one decided. The prosecutor argues: "The Pennsylvania death penalty statute directly presents to this Court a question which remains largely unanswered: whether, in what circumstances, and to what extent, a legislature may constitutionally define the factors to be considered by a sentencing authority as militating against the imposition of the death penalty?" That all-encompassing question is simply not

presented by this record and was not decided by the Court below.

The Pennsylvania Supreme Court has decided only that in the context of an otherwise mandatory death penalty (where any one of nine (9) aggravating circumstances was found to exist) the legislature could not exclude jury consideration of all relevant information bearing on the crime or the defendant except the three (3) circumstances listed in the Statute.

The second issue tendered by the Petition is whether Pennsylvania could permissibly impose a death sentence on one convicted of aggravated murder while serving a life sentence at the time of the commission of the offense. That issue is not presented by this record either, for as the Pennsylvania Supreme Court clearly states:

> The question, however, of a mandatory death sentence for a murderer already serving a life sentence is not properly before us, since § 1311 does not make death mandatory in such circumstances.

The Court also observes in a footnote (Petition, 20A n. 21) that this respondent was not serving a Pennsylvania life sentence at the time of this murder and that his District of Columbia sentences were still on appeal at that time. The Court does not foreclose the possibility that if properly called upon to make such a decision it might hold the Pennsylvania Statute restricted to persons serving Pennsylvania life sentences or to persons whose life sentences had become final at the time of the murder in question or that a District of Columbia sentence of twenty (20) years to life was not the life sentence contemplated by the Pennsylvania Statute. None of these issues has yet been decided in Pennsylvania and certainly have not been decided in this case. Therefore, the second question presented by the Petition for Certiorari is not before this Court under 28 U. S. C. § 1257.

A. The Pennsylvania Reading of Its Statute.

The Commonwealth argues in its Petition as though it were defending an uninterpreted state statute or even a federal statute. It ignores the truism that this Court, for present purposes is bound by what the Supreme Court of Pennsylvania says the state statute means. *Coleman v. Alabama,* 399 U. S. 1 (1970); *Watts v. Seward School Bd.,* 381 U. S. 126; *Hortonville J. S. D. No. 1 v. Hortonville Ed. Assn.,* 426 U. S. 482.

This statute has been definitively held to restrict jury consideration of mitigating circumstances as follows (*Com. v. Moody,* — Pa. —, 382 A. 2d at p. 447):

> Section 1311(d) limits the circumstances which the jury is to consider mitigating to "the following circumstances" and lists three:
>
> (i) The age, lack of maturity, or youth of the defendant at the time of the killing.
>
> (ii) The victim was a participant in or consented to defendant's conduct as set forth in section 1311(d) of this title or was a participant in or consented to the killing.
>
> (iii) The defendant was under duress although not such duress as to constitute a defense to prosecution under section 309 of this title (relating to duress).
>
> Of the three listed, only subsection (d)(2)(i) can be said to focus the jury's attention upon the character and record of the defendant as opposed to the circumstances of the crime, and that only to the limited extent of determining his age, lack of maturity, or youth *at the time of the killing*. Although a prior conviction

for an offense punishable by life imprisonment is an aggravating circumstance, the absence of a prior criminal record or even positive achievements or good works cannot be considered as mitigating. Whatever the offender's potential for rehabilitation, his life is to be terminated without consideration of it unless his status or situation at the time of the killing can be found to be a mitigating circumstance.

If the Pennsylvania statute, as the Commonwealth read it before *Moody,* did not limit the mitigating circumstances in the fashion the Supreme Court of Pennsylvania has now suggested, it certainly does since the decision in *Moody* and that is what is before this Court, not the Commonwealth's losing argument in the Pennsylvania Supreme Court as to what was intended to be covered by the Pennsylvania Legislature.

B. The Pennsylvania Supreme Court's Reading of the Constitutional Requirement.

The Pennsylvania Supreme Court, reviewing the plurality opinions of this Court in the *Gregg* quintet, concluded that the Pennsylvania scheme does not pass constitutional muster for the following stated reason:

> Thus, in our view, in order to protect a defendant from cruel and unusual punishment in a capital case, it is now necessary both that the aggravating circumstances that will justify the imposition of the death penalty be clearly defined for the sentencing authority, *and* that the sentencing authority be allowed to consider whatever mitigating evidence relevant to his character and record the defendant can present. (Petition for Cert., 16A, 382 A. 2d at p. 449)

The Court also held that the substantive limitation of these mitigating circumstances is aggravated by the legislative restriction of the jury's consideration to their existence and effect *"at the time of the killing."* (Petition for Cert., 17A, n. 19; 382 A. 2d at p. 449 n. 19).

Petitioner argues at length that the plurality opinions of this Court in the *Gregg* quintet provide inadequate guidance. But the Supreme Court of Pennsylvania, together with the Court of Appeals of Maryland, in *Blackwell v. State,* 278 Md. 466, 365 A. 2d 545 (1976), did not experience the Commonwealth's difficulty in distilling a common element from these decisions, which the Pennsylvania Court summarizes in a quotation from the plurality opinion in *Jurek v. Texas,* saying:

> What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine. 428 U. S. at p. 276, 96 S. Ct. at p. 2957, 49 L. Ed. 2d at p. 941.

Bound by *Moody* as to the meaning of the state law, this record presents merely an application of the *Jurek, Proffitt, Woodson* and *Roberts* rules to a law *prohibiting* jury consideration of all possible relevant information about the capital candidate.

II. Supervening Legislation.

Although Petitioner is at pains to argue, notwithstanding the holding of the Supreme Court of Pennsylvania in this case, that the statute allows consideration of a broader range of mitigating circumstances than appears to us on its face, the legislature of Pennsylvania appears to have yielded to the Pennsylvania decision in the *Moody* case and has, in fact, passed an amending statute adding two further descriptions of mitigating circumstances to be considered by the jury. Section 1311(d) of the sentencing code has been amended by adding subsections iv and v, which read as follows:

(iv) The killing was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(v) Sufficient other evidence relevant to character and record of the defendant as to be considered a mitigating circumstance.

While perhaps inartful, the foregoing language is the legislature's response to *Commonwealth v. Moody*. The legislature has thus made it impossible for any future capital defendant to use the *Moody* grounds as a basis for attacking the constitutionality of the statute and this renders review by this Court an academic exercise with respect to the future of the law of Pennsylvania. This Bill (S. 1233 as amended 2-22-78) has been sent to the governor as of 4-19-78.

While this supervening legislation does not entirely moot the issue presented by the Petition, (see: *Aikens v. California*, 406 U. S. 813, 32 L. Ed. 2d 511, 92 S. Ct. 1931 (1972)) there is now considerably less of the urgent "societal importance" and "far reaching effect" suggested by the Commonwealth concerning this decision. (Petition for Cert. p. 22).*

This Court has held that jurisdiction, even when it exists, should not be exercised unless the case tenders constitutional issues in clean-cut form without the problems of abstractness posed in this case by supervening legislation (*Socialist Labor Party v. Gilligan*, 406 U. S. 583, 32 L. Ed. 2d 317, 92 S. Ct. 1716 (1972)), which may indeed, under the law of Pennsylvania, have retrospective effect in view of the fact that it improves rather than worsens the lot of capital defendants. See *Dobbert v. Florida*, — U. S. —, 53 L. Ed. 344, 97 S. Ct. 2290.

* The decision will not even affect respondent's two co-defendants. They were sentenced to life imprisonment.

III. Finality.

Petitioner seeks certiorari from a decision of the Supreme Court of Pennsylvania which was rendered upon an *interlocutory appeal by the Commonwealth*. The background of this procedure is significant on the issue of finality.

At the conclusion of his trial, respondent's sentence was fixed at death by the jury but this verdict does not constitute the imposition of sentence. Following the death verdict, respondent filed his post-trial motions, alleging a variety of grounds for a new trial in addition to his attack on the constitutionality of the death penalty statute.

The post-verdict Motions Court consisting of three (3) Judges of the Court of Common Pleas decided two federal issues not presently before this Court. The Supreme Court of Pennsylvania notes that the three Judge Court found the legislative description of the statutory mitigating circumstances unconstitutionally vague because a reasonable jury would have to guess at the meaning of the terms "age", "youth" and "lack of maturity" and, secondly, the Court invalidated the statute on grounds based upon this Court's decision in *United States v. Jackson*, 390 U. S. 570, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968), because at the time of trial the death penalty was not applicable to non-jury and guilty plea proceedings, but only to those defendants who opted for trial by jury.

The Supreme Court of Pennsylvania specifically eschewed decision of either of these federal constitutional issues, placing its decision instead upon the unconstitutional restriction of mitigating evidence. 382 A. 2d at p. 444.

Because of the interlocutory certification by the trial Court of the death issue, the only question presented to the Supreme Court of Pennsylvania was the constitutionality of the statute and respondent Moody was unable to

appeal any of the issues decided against him by the Court of Common Pleas relating to errors in his trial, the ineffectiveness of trial counsel, etc. His appeal must await sentencing, which has been stayed by the trial Court pending final disposition of the single certified issue. Appellate Court Jurisdiction Act of 1970; 17 P. S. § 211.501(b) (Supp. 1977-78).

This means that, if the Commonwealth were to prevail in this Court, there would remain two federal issues relating to the death penalty for decision by the Supreme Court of Pennsylvania, as well as all of the state issues decided by the Court of Common Pleas but not yet ripe for consideration by the Supreme Court of Pennsylvania because of lack of finality of the matter as brought to that Court.

This Court has made it clear that finality for this purpose is a practical question to be decided primarily in light of the need to avoid "the mischief of economic waste and the inconvenience and costs of piecemeal review". The Court has limned out four categories of reviewable proceedings which, nevertheless, may require further state Court decision.

This Court considered in *Cox Broadcasting Co. v. Cohn*, 420 U. S. 469, 43 L. Ed. 328, 95 S. Ct. 1029, the nature of those cases in which finality was questionable but sufficient to permit review under 28 U. S. C. § 1257. *Cox* describes four (4) categories of cases in which the necessity for further proceedings in state Courts had not destroyed the finality of decisions seeking review.

The first are those in which decision of the federal issue is conclusive of the outcome of further proceedings.

The second are those in which the state-decided federal issue will survive and require decision regardless of the outcome of further state proceedings.

The third comprises those in which later review of the federal issue cannot be had whatever the ultimate outcome of the case. (In such cases, if petitioner prevails, the federal issue will be mooted; if he loses on the merits, the governing state law would not permit him again to present his federal claims for review.)

The fourth includes those situations in which petitioner might win the entire case in state Court on nonfederal grounds, thus rendering federal review unnecessary, but refusal of immediate review might seriously erode an important federal policy.

We doubt that the instant case falls into any of these categories. If the Commonwealth prevails in this Court on its present Petition, the application of the death penalty to this petitioner still requires resolution of the vagueness and *Jackson* grounds decided by the lower state Courts but not considered by the Supreme Court of Pennsylvania. It further depends upon state grounds urged by Respondent independent of the federal Constitution. If the Commonwealth should prevail here it will surely return seeking review of the two pretermitted constitutional issues. Later state proceedings could, but need not, moot the present issue. Abstractness, piecemeal review, expense and delay inhere in the present posture of the case.

Respondent respectfully suggests the Petition should be denied.

Respectfully submitted,

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CERTIFICATION OF SERVICE.

I, JOHN ROGERS CARROLL, ESQUIRE, counsel for respondent, THEODORE MOODY, hereby certify that I have caused a copy of the Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of Pennsylvania to be served upon Steven H. Goldblatt, Esquire, counsel for Petitioner, Robert P. Kane, Attorney General of the Commonwealth of Pennsylvania, Vincent X. Yakowicz, Solicitor General of the Commonwealth of Pennsylvania by depositing three copies each in the United States Mail, First Class, Postage Prepaid, addressed to:

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DATED: 27th April, 1978